No. 93-980

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS COMPANY; MARISOL, INC.; MOBIL OIL CORPORATION; PROCTER & GAMBLE MANUFACTURING CO.; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

—v.—

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE M. NEWCOMBE*
DAVID B. SMALLMAN
ELIZABETH A. FUERSTMAN
SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)
425 Lexington Avenue
New York, NY 10017-3909
(212) 455-2000

Counsel for Petitioners

*Counsel of Record

QUESTIONS PRESENTED

(1) Did the court below err in concluding, contrary to recent decisions of the Second, Fifth, Eighth and Eleventh Circuits with which the court below expressly disagreed, that the denial of a motion for summary judgment based upon a right not to go to trial arising as a result of a settlement is not immediately appealable?

(2) Did the court below err in concluding, contrary to a decision of the First Circuit, that Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f)(2), does not grant immunity from contribution claims to those who resolve their liability to the Government in judicially or administratively approved settlements as to matters addressed in the settlement and, therefore, an order denying a motion for summary judgment under Section 113(f)(2) is not immediately appealable?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners Mayco Oil & Chemical Company; AT&T Technologies, Inc. by its successor American Telephone and Telegraph Co.; Biocraft Laboratories, Inc., Chesebrough-Pond's USA Co.; CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; Siegfried Chemical; General Electric Company; Huls America Inc.; IBM Corporation; J.T. Baker, Inc.; Lever Brothers Co.; Marisol, Inc.; Mobil Oil Corporation; Procter & Gamble Manufacturing Co.; Phelps Dodge Corporation; Russell Reid Company; Saft Nife Inc.; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; and Witco Corporation were defendants-appellants below; respondents Transtech Industries, Inc.; Kin-Buc Inc.; and Filcrest Realty, Inc. were plaintiffs-appellees. Additional parties, who were defendants-appellants below, but are not petitioners, are Astro Pak; Hexcel Corporation; John H. Cooney, Inc., Occidental Chemical Corporation; Procedyne Corporation; Reynolds Metals Company; Safety-Kleen Envirosystems Company; Sequa Corporation (formerly Sun Chemical Corporation); Spectraserv, Inc. (formerly Modern Transportation Co.); and Stroh Brewery Company.

Pursuant to S. Ct. Rule 29.1:

Petitioner Mayco Oil & Chemical Company notes that Mayco Oil & Chemical Company is a division of Castrol Industrial East Inc. (a Penn. Corp.). The following are the parents of Castrol Industrial East Inc.: Castrol Industrial Inc. (Del.), Castrol Inc. (N.J.), Burmah Castrol USA Inc., Burmah Castrol Inc., Burmah Castrol PLC (the ultimate UK parent). The following are corporate parents, subsidiaries, or affiliates of Castrol Inc. which are publicly held:

Burmah Castrol PLC, Burshane (Pakistan) Ltd., Burmah-Shell (Pakistan) Ltd., Pakistan Petroleum Ltd., Pakistan Refinery Ltd., Sui Northern Gas Pipelines Ltd., and Castrol India Ltd.

Petitioner AT&T Technologies, Inc. by its successor American Telephone and Telegraph Co. notes that the following are non-wholly owned subsidiaries, Joint Ventures, Affiliates and Partnerships with majority ownership under 100%: AT&T Automotive Services, Inc., AT&T Aviation Technologies & Systems, Ltd, AT&T Business Communications Europe, Ltd., AT&T Business Communications Systems S.R.O., AT&T EasyLink Services Australia, Ltd., AT&T Fitel Company, AT&T Japan Semiconductor Marketing, Ltd, AT&T Jens Corporation (Japan), AT&T Network Systems International, B.V., AT&T Network Systems Nederland, B.V., AT&T Network Systems U.K., Ltd., AT&T Network Technologies (Thailand) Ltd., AT&T of Beijing Fiber Optic Cable Co. Ltd, AT&T Prague S.R.O., AT&T Quingdao Telcom (PRC), AT&T Software Japan Ltd., AT&T St. Petersburg (Russian Federation), AT&T Taiwan Telecommunications Co. Ltd., AT&T Yazaki Fiber Optic Cable Co. Ltd., AT&T/Stein Phase II Partnership, Barphone, CAB Computeranwendigan-Baratunga GmbH, CAB South, CAB Vienna, Claimview Limited, Dataid S.A., EO Computers, Inc., Grupo Informatica Y Telecommuniaciones, S.A., Infoplan Informationstechnick GmbH, Inview, Inc., Litespec Inc., Lycom A/S (Denmark), Melcombe Court Management (Marylebone) Limited, NCR (Nigeria) Ltd., NCR (Thailand) Ltd., NCR Bilei Islem Sistemleri A.S., NCR Corporation (Philippines), NCR Europe, Ltd., NCR Gabon S.A.R.L., NCR Industrial De Mexico, S.A. De C.V., NCR Japan, Ltd., NCR Nederland N.V., Oswego Cogeneration Facility Limited Partnership, P.T. AT&T Network Systems Indonesia, Regis Court Management (Marylebone) Limited, Safari Systems, St. John's Institutional

Investors Ltd. (Meridian), Telfa S.A., Wadbss Energy Limited Partnership,

Petitioner Biocraft Laboratories, Inc. notes that it has no parent companies and no partially owned subsidiaries. Biocraft Laboratories, Inc. owns 25% of Delmarva Laboratories, Inc., the remainder of which is owned by three employees.

Petitioner Chesebrough-Pond's USA Co. notes that it is an unincorporated operating division of Conopco, Inc. It has no subsidiaries.

Petitioner CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company notes that it has no non-wholly owned subsidiaries or parent companies.

Petitioner Fluid Packaging Co., Inc. notes that it has no non-wholly owned subsidiaries;

Petitioner FMC Corporation notes that the following are non-wholly owned subsidiaries: A/O FMC Siberia Petroleum Equipment, Antah FMC Supplies and Services SDN.BHD., Asia Lithium Corporation (Ajia Lichimu Kabushiki Kaisha), Asia Pacific Agricultural Development Corporation, FMC Agroquimica de Mexico, S. de R.L. de C.V., FMC Gabon S.A.R.L., FMC Gold Canada Ltd., FMC Gold Company, FMC Gold International Sales Corporation, FMC Jerritt Canyon Corporation, FMC Minerals Corporation, FMC-Nurol Savunma Saneyll A.S., FMC Paradise Peak Corporation, FMC Petroleum Equipment Limited, FMC Services & Supplies Occidente, S.A., FMC Services & Supplies Oriente, S.A., FMC United (Private) Limited, FMC Wellhead de Venezuela, S.A., Forel, S.L., Foret, S.A., Freeport/FMC Foreign Sales Corporation, H Two O Two Limited, L.H. Company, Ltd. (LH Kabushiki Kaisha), Meridian Gold Company, Minera FMC Limitada, Minera FMC S.A. de C.V., Natural Products Sciences, Inc., "Perorsa" - Peroxidos

Organicos, S.A., Philippine Marine Products, Inc., P.T. FMC Santana Petroleum Equipment Indonesia, Separasystems Inc., Sibelco Espanola, S.A., Thai Peroxide Company, Ltd., Tokai Electro-Chemical Company, Limited (Tokai Denka Kogyo Kabuskihi Kaisha), Tripoliven, C.A., Turegano, S.A., Valentin Herralz, S.A., Vallays Corporation.

Petitioner Ganes Chemicals, Inc. notes that it is a wholly owned subsidiary of its parent company, Siegfried Limited (Zofinger, Switzerland). There are no non-wholly owned subsidiaries of Ganes Chemicals, Inc. Petitioner Siegfried Chemical notes that it is a wholly owned subsidiary of petitioner Ganes Chemicals, Inc.

Petitioner General Electric Company notes that it has no parent company and no subsidiaries which are not wholly owned.

Petitioner Huls America Inc. notes that its parent corporations are: Huls Corporation (a Delaware corporation), which is owned by Veba Corporation (a Delaware Corporation) which is owned by Veba A.G. (a German corporation) (50.1%), Stinnes A.G. (a German corporation) (10.4%), Rohm Holding Gmbh (a German corporation) (10.9%) and Huls A.G. (a German corporation) (28.6%). Huls America Inc.'s only non-wholly owned subsidiary is Nuodex Mexicana S.A. de C.V. (a Mexican corporation).

Petitioner IBM Corporation notes that it has no parent company and notes the following non-wholly owned subsidiaries: IBM de Mexico, S.A., IBM World Trade Asia-Pacific Corp., IBM Philippines Incorporated, IBM Thailand Company Ltd., International Business Machines of Belgium S.A., Compagnie IBM France, S.A., IBM Distribution and Support, S.A., IBM Europe, S.A., IBM Trade Development, S.A., Companhia IBM Portuguesa, S.A., International Business Machines, S.A.

Petitioner J.T. Baker, Inc. notes that Richardson Vicks Inc. is its parent corporation.

Petitioner Lever Brothers Company notes that it is an unincorporated operating division of Conopco, Inc. It has no subsidiaries.

Petitioner Marisol, Inc. notes that it has no subsidiaries or parent corporations.

Petitioner Mobil Oil Corporation notes that its parent corporation is Mobil Corporation.

Petitioner Procter & Gamble Manufacturing Co. notes that Procter & Gamble Company is its parent corporation.

Petitioner Phelps Dodge Corporation notes that it has no parent companies and notes that the following are non-wholly owned subsidiaries: Aislamientos Plasticos C.A., (PLASTICA), Alambres Y Cables de Panama, S.A. (ALCAP), Alambres y Cables Venezolanos, C.A. (ALCAVE), ALCAP Commercial, S.A. (ALCOMER), AOT, Inc., Bisbee Queen Mining Company, C.T.C. (Conelac Trading Company) S.A. de C.V., Cables Electricos Ecuatorianos, C.A. (CABLEC), Cahosa, S.A., Celbac, S.A., Cobre Cerrillos, S.A. (COCESA), Cobre Colada Continuo, C.A., Cocesa Ingenieria y Construccion, S.A. (COCETAL), Columbian Carbon Deutschland GmbH, Columbian Carbon Japan Ltd., Columbian Carbon Philippines, Inc., Columbian Tiszai Carbon Ltd., Comercial ECOHSA, S.A. de C.V., CONDUCEN, S.A., CONDUCOMER, S.A. (formerly Industria de Electrocoductores, S.A. (INDELEC), Conductores de Aluminio, C.A. (CONAC), Conductores Electricos de Centro America, S.A. (CONELCA), Corporation Venezolana del Cobre, C.A. (VENCOBRE), Electroconductores de Honduras, S.A. de C.V. (ECOHSA), Fabrica de Conductores Electricos, S.A. (FACELEC), Mexicana de Construccion E. Ingenieria de

Telecommunications S.A. de C.V. (MEXITEL), Phelps Dodge Eldra Gesellshaft m.b.H., Phelps Dodge Outokumpu Copper OY International, Phelps Dodge Thailand Limited, Pietersburg Iron Company (Proprietary) Limited, Representaciones de Industrias Venezolanas, C.A., SPD Magnet Wire Co., South Australian Uranium Corporation PTY. Limited.

Petitioner Russell Reid Company notes that it has no parent company and no subsidiaries.

Petitioner Saft Nife Inc. notes that it is a wholly owned subsidiary of Saft America, Inc. which, in turn, is a wholly owned subsidiary of Alcatel Alsthom (France).

Petitioner Smithkline Beecham Corporation notes that its parent corporation is SmithKline Beecham plc, and that the following are non-wholly owned subsidiaries of SmithKline Beecham Corporation: Beecham Enterprises Inc., Beecham Pakistan (Private) Limited, Cainta Realty Corporation, Eskayef Limited, Fink G.m.b.H., FT Management Corporation, Franklin Town Corporation, P.T. SmithKline Beecham Pharmaceuticals, Sino-American Tianjin Smith Kline & French Laboratories Ltd., Smith Kline & French of Pakistan Ltd., SmithKline Beecham Animal Health (Taiwan) Limited, SmithKline Beecham Consumer Brands, L.P., SmithKline Beecham Consumer Brands Limited, SmithKline Beecham Nigeria plc, SmithKline Beecham Nippon Zenyaku K.K.

Petitioner Sybron Transition Corp. and Petitioner Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex note that there are no non-wholly owned subsidiaries of Sybron Transition Corp. and Sybron Chemicals, Inc. However, Sybron Corporation, a publicly held company is related to Sybron Transition Corp. and Sybron Chemicals, Inc. is also a publicly held company.

Petitioner Witco Corporation notes that it has no parent company and no subsidiaries.

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IN THE

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OCTOBER TERM, 1993

No. 93-

MAYCO OIL & CHEMICAL COMPANY; AT&T TECHNOLOGIES INC. BY ITS SUCCESSOR AMERICAN TELEPHONE AND TELEGRAPH CO.; BIOCRAFT LABORATORIES, INC.; CHESEBROUGH-POND'S USA CO.; CPC INTERNATIONAL INC. INCLUDING BEST FOODS DIVISION AND PENICK CORPORATION SUCCESSOR TO S.B. PENICK COMPANY; FLUID PACKAGING CO., INC.; FMC CORPORATION; GANES CHEMICALS, INC.; SIEGFRIED CHEMICAL; GENERAL ELECTRIC COMPANY; HULS AMERICA INC.; IBM CORPORATION; J.T. BAKER, INC.; LEVER BROTHERS CO.; MARISOL, INC.; PROCTER & GAMBLE MANUFACTURING CO.; MOBIL OIL CORPORATION; PHELPS DODGE CORPORATION; RUSSELL REID COMPANY; SAFT NIFE INC.; SMITHKLINE BEECHAM CORPORATION; SYBRON TRANSITION CORP.; SYBRON CHEMICALS, INC., INCLUDING AS TRADE NAMES GAMLEN CHEMICAL AND TANATEX; WITCO CORPORATION,

Petitioners,

v.

TRANSTECH INDUSTRIES, INC.; KIN-BUC INC.; FILCREST REALTY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

This case presents two questions concerning the applicability of the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). On both questions, there is a conflict in the circuits.

The first question is closely related to that raised in a petition for a writ of certiorari recently granted by this Court in *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993) ("*Desktop*"), *cert. granted*, 114 S. Ct. 379 (Nov. 1, 1993), which concerns the immediate appealability of an order denying summary judgment based upon a right not to go to trial by virtue of a settlement agreement between two private parties. The issue in this case, however, presents a narrower, even more compelling ground for application of the collateral order doctrine because it concerns a bargained-for right not to go to trial arising from a settlement agreement Petitioners entered into with the United States Government and the operation of 42 U.S.C. § 9613(f)(2) ("Section 113(f)(2)"), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA" or the "Act"). That section provides in pertinent part that parties who enter into judicially approved settlements with the Government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Congress enacted Section 113(f)(2) to encourage private parties to settle claims brought against them by the Government under CERCLA. Thus, Petitioners' settlement with the Government not only implicates all of the policy considerations raised by *Desktop*, but also directly relates to the policy considerations underlying CERCLA's entire statutory scheme, including the prompt clean-up of hazardous waste sites and the minimization of litigation through early settlement of alleged environmental liability.

Relying on *Desktop*, the court below expressly disagreed with the holdings of Second, Fifth, Eighth and Eleventh Circuits, each of which has previously held that an order denying enforcement of a settlement agreement is immediately appealable under the *Cohen* doctrine in light of the well-established public policy supporting voluntary settlements of litigation by the parties to a dispute. The Third Circuit held that the collateral order doctrine did not apply to the appeal in this case, thus widening the conflict in the circuits on this issue.

The second question raises an entirely separate ground for finding collateral order jurisdiction in this case, namely, whether Section 113(f)(2) provides to those who enter into judicially approved settlements with the Government immunity from contribution claims regarding matters addressed in the settlement. The essence of the legislative right granted under Section 113(f)(2) is the right not to be tried on claims for contribution by non-settling parties. Absent vindication by an immediate appeal, this statutory right will be irretrievably lost and the incentive Congress provided to encourage settlement of Superfund claims with the Government will be severely diminished. The Third Circuit's holding that Section 113(f)(2) does not bestow immunity on Petitioners conflicts with the First Circuit's decision in *United States v. Cannons Engineering Corp.*, 899 F. 2d 79, 91 (1st Cir. 1990), where the court held that Section 113(f)(2) "immunizes settling parties from liability for contribution," and also conflicts with the decisions of numerous district courts. Moreover, the decision eviscerates the carrot and stick scheme Congress enacted in Section 113(f)(2) to encourage early settlement of CERCLA claims brought by the Government, and thus raises serious public policy issues that this Court should address.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on September 17, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 5 F.3d 51 (3d Cir. 1993), and is reprinted in the appendix hereto ("App.") at 1a. The first opinion of the United States District Court for the District of New Jersey is reported at 798 F. Supp. 1079 (D.N.J. 1992), and the second opinion is unreported; both are reprinted, with accompanying orders, at App. 22a, and 52a, respectively.

JURISDICTION

Respondents Transtech Industries, Inc., Kin-Buc, Inc., and Filcrest Realty, Inc., initiated this case by filing a complaint against Petitioners Mayco Oil & Chemical Company, et al. in the United States District Court for the District of New Jersey on August 24, 1990. Jurisdiction was based on 28 U.S.C. § 1331.

On April 1, 1991, Petitioners moved to dismiss the complaint. The district court treated the motion as one for summary judgment under Fed. R. Civ. P. 56 and denied it in an order entered on August 5, 1992. Petitioners moved for reconsideration of the district court's order or, in the alternative, for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). On October 9, 1992, the district court denied the motion.

Petitioners filed a notice of appeal on November 6, 1992. On September 17, 1993, the court of appeals dismissed the appeal for want of jurisdiction. Petitioners did not seek a rehearing of the court of appeals' decision.

The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1291 of Title 28, United States Code, provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 9613(f) of Title 42, United States Code, provides in pertinent part:

> (1) Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title.
>
> (2) A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of others by the amount of the settlement.

STATEMENT OF THE CASE

Respondents Transtech Industries, Inc.; Kin-Buc Inc.; Filcrest Realty, Inc. ("Respondents" or "Nonsettlors") are the former owners and/or operators of a waste disposal site located near Edison, New Jersey known as the Kin-Buc Landfill ("Kin-Buc"). Respondents declined in 1988 to participate in a settlement offered by the United States Government regarding their liability for activities at Kin-Buc. Petitioners[1] are a sub-group of alleged generators and transporters of waste disposed at Kin-Buc. Petitioners have each resolved their liability to the United States Government for all past and future response costs and response actions in connection with Kin-Buc, absent a contingency not applicable here, through a settlement that was judicially approved on August 3, 1988.

On August 24, 1990, Respondents filed suit against Petitioners in the United States District Court for the District of New Jersey. Respondents sought contribution towards response costs incurred and to be incurred by them at Kin-Buc based on a variety of federal and state grounds.

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1. Mayco Oil & Chemical Company; AT&T Technologies Inc. by its successor American Telephone and Telegraph Co.; Biocraft Laboratories, Inc.; Chesebrough-Pond's USA Co.; CPC International Inc. including Best Foods Division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; Siegfried Chemical; General Electric Company; Huls America Inc.; IBM Corporation; J.T. Baker, Inc.; Lever Brothers Company; Marisol, Inc.; Mobil Oil Corporation; Phelps Dodge Corporation; Procter & Gamble Manufacturing Co.; Russell Reid Company; Saft Nife Inc.; Smithkline Beecham Corporation; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; Witco Corporation (collectively "Petitioners").

A. Settlors' Consent Decree With the United States Government

From 1947 until 1968, Kin-Buc functioned as a disposal site. Thereafter, it became a state-approved landfill for hazardous wastes. Kin-Buc continued to serve as a hazardous waste landfill until 1976, when the State of New Jersey revoked its operating permit and enjoined further hazardous waste disposal. The EPA later placed Kin-Buc on the National Priorities List established pursuant to section 105 of CERCLA and began undertaking response actions.

Subsequently, the United States Government sought from Respondents reimbursement of the Government's expenditures at Kin-Buc. When Respondents declined to reimburse the costs incurred by the Government, the United States Department of Justice and the United States Environmental Protection Agency initiated negotiations with approximately 226 alleged generators and transporters of waste disposed at Kin-Buc. These 226 parties ("Settlors") ultimately agreed to pay the amount originally sought from Respondents. Accordingly, on May 16, 1988, the United States filed a complaint ("Government's Complaint") pursuant to section 107 of CERCLA in the district court against the Settlors for all of the past and future costs incurred by the United States in response to the release and threatened release of hazardous substances into the environment at Kin-Buc. The Government's Complaint recited that the Government had incurred costs to date of approximately $5 million for actions taken in response to the release and threatened release of hazardous substances from Kin-Buc, and further recited that the Government "continues to incur response costs, including the cost of enforcement." The Settlors entered into a Consent Decree with the Government on the same day that the Government filed its complaint.

Under the provisions of the Consent Decree, in return for the Settlors' agreement to pay for all of the Government's past response costs, the Government released Settlors from liability for past response costs and entered into a covenant not to sue Settlors for any future response costs at Kin-Buc, subject only to the contingency that the Government, having made all reasonable efforts, was unable to compel nonsettling parties to take future response actions or to recover from the nonsettling parties future response costs.[2]

On June 3, 1988, notice of the settlement agreement between Settlors and the United States was duly published in the Federal Register permitting any interested party to comment on its terms. 53 Fed. Reg. 20379 (1988). After considering all comments concerning the settlement, Judge Alfred J. Lechner of the United States District Court for the District of New Jersey approved the Consent Decree as fair and reasonable by order entered August 3, 1988, and opinion filed October 18, 1988. Judge Lechner dismissed with prejudice Paragraph 1 of the Government's prayer for relief, regarding costs incurred through April 30, 1987, and dismissed without prejudice the remainder of Government's Complaint, including the Government's request for judgment in its favor for all costs incurred after April 30, 1987.

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2. It is undisputed that the contingency referred to in the Consent Decree has not occurred.

B. The Suit for Contribution Filed by Nonsettlors

On August 24, 1990, Respondents filed a complaint ("Nonsettlors' Complaint") against 445 defendants, including the 226 Settlors. The Nonsettlors' Complaint sought contribution from the Settlors for response costs incurred and to be incurred by Respondents at Kin-Buc.

C. Settlors' Motion for Summary Judgment

On April 1, 1991, Settlors moved to dismiss the Nonsettlors' Complaint on the ground that they were immune from all claims for contribution concerning Kin-Buc by virtue of Section 113(f)(2) of CERCLA and the judicially approved settlement resolving their liability to the Government for all past and future response costs and response actions at Kin-Buc. Respondents and those defendants who had not settled with the Government opposed the motion.

On August 5, 1992, the district court entered an order denying Settlors' motion, determining that the Consent Decree only resolved the Government's response costs, not the response costs of third parties, and therefore did not cover the matters for which Settlors were being sued. App. 51a. On August 13, 1992, Settlors moved for reconsideration or, in the alternative, for certification of an interlocutory appeal. The district court denied the motion and application by order entered on October 9, 1992. App. 62a.

D. The Third Circuit Dismisses the Appeal

On November 6, 1992, thirty-three of the Settlors filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit.[3] Settlors argued below that the Third Circuit had jurisdiction to hear the appeal under the collateral order doctrine set

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3. Settlors filed a motion for a stay of proceedings in the district court on November 20, 1992. That motion was granted on March 10, 1993.

forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because the district court's order: (1) conclusively determined the disputed question; (2) resolved an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable if the Settlors were required to wait until after trial to appeal. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Specifically the order of the district court conclusively determined the disputed question, namely, whether Settlors were immune from plaintiffs' claims for contribution by virtue of their settlement with the Government and Section 113(f)(2) of CERCLA. That issue is completely separate from the merits of the claims for contribution, since it turns solely on the scope of the matters addressed in the Settlors' settlement with the Government and the face of the claims asserted in the contribution action. It is an issue that can be answered by determining whether, under the terms of the settlement, the Government could sue the Settlors for the same matters for which contribution is sought. If the answer is no, the matters for which contribution is sought are, by definition, "matters addressed in the settlement" and the settlors are immune from such claims under Section 113(f)(2). Here, it is undisputed that as a result of the settlement, the Government cannot sue Settlors for the very claims that plaintiffs assert in their contribution action. Finally, since the district court order denied to Settlors their rights under Section 113(f)(2) to avoid trial, that order would be unreviewable if Settlors had to endure a full trial before being able to appeal from it.

Settlors noted that four circuit courts of appeals had previously held that appellate jurisdiction exists under the collateral order doctrine over an appeal from a district court order denying a motion to dismiss based on the right not to go to trial by virtue of a settlement agreement. *See Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *Grillet*

v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989). Settlors also argued that Section 113(f)(2) provides express statutory immunity to those who settle CERCLA claims with the Government, and thus provides an alternative ground for collateral order jurisdiction under the line of cases that recognize a right of immediate appeal to vindicate a claim of immunity. *See, e.g., Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

On September 17, 1993, the Third Circuit dismissed the appeal for want of appellate jurisdiction. App. 21a. In its opinion, the court of appeals held that "orders denying summary judgments on claims of immunity from trial based on releases or settlements are not appealable" as collateral orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). App. 20a. The court of appeals expressly disagreed with the above-noted decisions of four other courts of appeals and expressly relied upon the decision of the Tenth Circuit in *Desktop*, now on review by this Court. App. 18a.

The Third Circuit further found, without citation to any authority and in conflict with the decisions of the United States Court of Appeals for the First Circuit and several district courts, including the district court below, that Section 113(f)(2) of CERCLA does not provide to parties who settle with the Government immunity from claims by non-settling third parties. App. 18a.

E. The District Court Issues A Stay Pending A Disposition Of This Petition

On December 13, 1993, the district court granted Petitioners' motion to stay all proceedings below as to Petitioners pending their petition to this Court for a writ of certiorari and, if granted, pending a decision from this Court. In so doing, the district court noted the similarity between the issues raised here and those raised in *Desktop*. App. 19a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPRESSLY CONFLICTS WITH RECENT DECISIONS OF THE SECOND, FIFTH, EIGHTH, AND ELEVENTH CIRCUITS

This Court should grant the petition for a writ of certiorari to resolve the conflict between the ruling below and recent decisions of the Second, Fifth, Eighth and Eleventh Circuits. *See* S. Ct. Rule 10.1(a). As in *Desktop*, this is not a case in which the existence of a circuit conflict needs to be inferred from an analysis of allegedly conflicting cases. Here, the Third Circuit expressly acknowledged the contrary holdings of the other circuits, and nonetheless adopted its position in the face of those holdings. In the Court's words:

> More significant, however, is our disagreement with the decisions in *Forbus*, *Grillet*, *Janneh* and *Towers*. We believe that they undermine the final-judgment rule and expand the immunity concept beyond that which the Supreme Court has approved. In our view, *Desktop Direct, Inc. v. Digital Equip. Corp.* . . . more closely conforms to the Supreme Court's teaching.

App. 18a.

While expressly disagreeing with the four courts of appeals, the Third Circuit, without elaboration, differentiated the settlement agreement here with the settlements at issue in those cases on the ground that the other settlements were between the plaintiff and defendant whereas this settlement agreement is between defendants and a third party, the United States Government. However, because Section 113(f)(2) of CERCLA expressly provides that parties who resolve their liability to the Government in judicially approved settlements "shall not be liable for claims for contribution" by non-settling third parties, such as Respondents, the court's distinction is one without any legal significance under the facts of this case.

Indeed, the only difference between *Desktop* and this case is that the right to avoid trial here presents a narrower, more compelling ground for application of the collateral order doctrine.[4] In this case, Petitioners' right is based upon a settlement with the Government which, by operation of Section 113(f)(2), immunizes Petitioners from claims for contribution by all non-settling parties for matters address in the Consent Decree. *See Midland Asphalt Corp. v. U. S.*, 489 U.S. 794, 801 (1989); *cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). The fact that Petitioners' right to avoid trial is based not solely on a private contractual agreement but also on a federal statute has two important consequences.

First, the public policy arguments encouraging voluntary settlements and the minimization of litigation that support the right to appeal immediately orders denying enforcement of settlement

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4. The petitioners in *Desktop* have cogently presented the disagreement among the circuits on the question concerning whether collateral order jurisdiction exists from the denial of a motion to dismiss or for summary judgment based on the right to avoid trial by virtue of settlement agreement, and Petitioners adopt the arguments set forth therein.

agreements, *see, e.g., Janneh*, 887 F.2d at 435-36, apply even more strongly to this case. The legislative history of Section 113(f)(2) makes clear that Congress specifically intended that Section 113(f)(2) encourage early settlements of environmental liability and decrease litigation. *See* A Legislative History of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, H.R. Rep. No. 253, 99th Cong., 2d Sess., at 59, *reprinted in* 1986 U.S.C.C.A.N. 2841 (Congress' purpose in enacting CERCLA Section 113(f)(2) was to "encourage quicker, more equitable settlements, *decrease litigation* and thus facilitate cleanups") (emphasis supplied). *See also id.* at 2862 ("[i]n addition to encouraging settlement, [Section 113(f)(2)] will help bring an increased measure of finality to settlements.")

Second, because the settlement agreement here is a product of a comprehensive statutory scheme designed by Congress to facilitate the clean-up of hazardous waste sites, this case raises important public policy issues concerning the remediation of those sites. The Third Circuit's determination has effectively eviscerated Petitioners' rights under Section 113(f)(2), and in doing so, has significantly diminished the incentive for parties to enter into settlements with the Government, thereby disrupting the nationwide operation of the federal environmental regime for hazardous waste site remediation.

In *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), Judge Cox, who dissented from the Eleventh Circuit's determination that collateral order jurisdiction exists from the denial of a motion to dismiss by virtue of a right to avoid trial stemming from a private settlement agreement, based his disagreement with the majority on the ground that "the asserted right not to be sued *based upon private agreements* . . . is not sufficiently important to justify an interlocutory appeal." *Id.* at 1044 (emphasis added). The

Tenth Circuit in *Desktop* again emphasized that an agreement between two private parties does not raise issues of sufficient importance to justify the invocation of collateral order jurisdiction. *See Desktop*, 993 F.2d at 758 (noting that the "only situation that the Supreme Court has found important enough to allow an interlocutory appeal in the absence of a constitutional or statutory guarantee involves a district court's denial of qualified immunity for a public official defendant"). The settlement agreement here, unlike the settlement agreement in *Desktop*, which was between two private parties, is between the United States Government and hundreds of alleged generators and transporters of hazardous waste and implicates an entire statutory scheme. The Third Circuit's determination that parties who settle their CERCLA liability with the Government cannot immediately appeal a decision denying enforcement of their right not to go to trial arising from a judicially approved settlement agreement and Section 113(f)(2) will undermine the incentive to settle CERCLA claims with the Government and will interfere with the prompt clean-up of hazardous waste sites.

For the above reasons, this Court should grant this petition for a writ of certiorari to the Third Circuit and consolidate this case with *Desktop* in order to resolve important questions regarding application of the collateral order doctrine to settlements with the Government pursuant to Section 113(f)(2).

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FIRST CIRCUIT, THE LANGUAGE OF SECTION 113(f)(2) OF CERCLA AND THE LEGISLATIVE HISTORY OF THAT PROVISION

This Court should also grant this petition for a writ of certiorari because the Third Circuit erred in holding that Section

113(f)(2) does not provide settling parties with immunity from trial on claims for contribution brought by nonsettling parties, a decision that conflicts with the First Circuit's holding in *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 91 (1st Cir. 1990), that Section 113(f)(2) "immunizes settling parties from liability for contribution."

This Court has repeatedly held that an order denying a claim of absolute and qualified immunity is immediately appealable under *Cohen*. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Court has reasoned that, absent immediate appeal, the benefits of immunity, including "avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial," would be forfeited. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993).

In addition, this Court has held that, where a right not to be tried rests upon an explicit statutory guarantee, the denial of a motion to dismiss based on that right is immediately appealable. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) ("A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur."). Petitioners' claim of immunity indeed rests upon an explicit statutory guarantee. The Third Circuit's contrary determination is at odds with the language of Section 113(f)(2), the legislative history of that provision, and the decisions of several courts, including the First Circuit, interpreting that provision.

1. The Language of Section 113(f)(2) Provides Petitioners with Immunity from the Claims Asserted by Plaintiffs

The express language of Section 113(f)(2) provides that parties who resolve their liability with the Government "*shall not be liable for claims* for contribution regarding matters addressed in the settlement." (emphasis added) Thus, the immunity afforded by Section 113(f)(2) is not confined to immunity from liability for a money damage award; it extends to immunity from the very *claims* brought by non-settling parties.

The terminology of Section 113(f)(2) is significant, for Congress has used the same language to bestow immunity upon the United States. In the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671-2680 ("FTCA"), the United States has waived immunity for the torts of its employees under certain circumstances. Section 1346(b) of the FTCA provides that the United States shall be liable for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government . . . under circumstances where the United States, if a private person, would be liable to the claimant." This waiver, however, is limited by several exceptions set forth in 28 U.S.C. § 2680. Significantly, in identifying the limitations on the waiver of immunity, Congress has identified particular *claims* for which the United States cannot be sued. *See* 28 U.S.C. § 2680 (a) - (n).

In addition, Congress did not place Section 113(f)(2) of CERCLA among the enumerated defenses to liability set forth in Section 107(b), but instead set forth this immunity in a separate statutory provision enacted for the express purpose of providing peace and finality to those who resolve their liability to the

Government in a judicially or administratively approved settlement as to all matters addressed in that settlement.

2. The Legislative History of CERCLA and Section 113(f)(2) Demonstrates That Congress Intended to Provide Settling Parties With Immunity

The legislative history of CERCLA and Section 113(f)(2) also demonstrates that Congress intended to provide settling parties with immunity in order to encourage parties to settle with the Government and facilitate the rapid clean-up of hazardous waste sites.

Congress enacted CERCLA in 1980 to provide a tool to combat widespread environmental and public health damage resulting from the disposal of hazardous waste. *See Pennsylvania v. Union Gas Company*, 491 U.S. 1, 7 (1989); *see also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257-58 (3d Cir. 1992). The statute is designed to force polluters to pay for costs associated with remedying environmental contamination and provides a wide array of mechanisms through which cleanup can be effectuated. *See Union Gas Company*, 491 U.S. at 7.

In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ("SARA"). Significantly, when the Senate Judiciary Committee debated whether to impose a good faith requirement as a condition to receiving protection under Section 113(f)(2), the Committee resolved to delete that requirement "as an independent requirement for obtaining *immunity* from contribution claims." H.R. Rep. No. 253, 99th Cong., 2d Sess., at 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3042 (emphasis supplied); *see also id.* (referring to a settlement with the government "provid[ing] immunity from contribution claims" under Section 122). As noted above, the

legislative history also indicates that Congress enacted Section 113(f)(2) to "encourage quicker, more equitable settlements, *decrease litigation* and thus facilitate cleanups." H.R. Rep. No. 253, 99th Cong., 2d Sess., at 59 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2841 (emphasis supplied). *See also id.* at 2862. Thus, Congress' express purpose behind Section 113(f)(2) was to grant immunity to those who settle with the Government to encourage early settlements of CERCLA claims, decrease litigation and promote the speedy clean-up of hazardous waste sites. These goals are completely thwarted by the Third Circuit's decision.

3. Courts Have Construed Section 113(f)(2) As Providing Immunity

The Third Circuit's holding that Section 113(f)(2) does not bestow immunity from contribution claims on those who enter into judicially or administratively approved settlements conflicts with the decision of the United States Court of Appeals for the First Circuit, as well as the decisions of several district courts, including the district court below, all of which have characterized Section 113(f)(2) as providing immunity to settling parties. In *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 91 (1st Cir. 1990), the First Circuit held:

> In the SARA Amendments, Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability. *The statute immunizes settling parties from liability for contribution* and provides that only the amount of the settlement—not the pro rata share attributable to the settling party—shall be subtracted from the liability of the non-settlors.

(emphasis supplied). Although the *Cannons* decision did not address the appealability of an order denying a party immunity under Section 113(f)(2), it follows directly from that court's

characterization of Section 113(f)(2) as "immunity" that such an order would be immediately appealable in the First Circuit. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The district court below similarly held that "[s]ection 113(f)(2) provides immunity from contribution liability for all parties that settle with the Government, for all the matters covered in Consent Decree." App. 53a. Numerous other district courts have made similar pronouncements. *See, e.g., Dravo Corp. v. Zuber*, 804 F. Supp. 1182, 1185 (D. Neb. 1992) ("The courts have consistently enforced CERCLA by providing settling parties with immunity from any claim regarding matters in the settlement. . . ."); *City and County of Denver v. Adolph Coors Company*, 829 F. Supp. 340, 346 (D. Colo. 1993) (characterizing Section 113(f)(2) as providing immunity from contribution claims); *United States v. Asarco, Inc.*, 814 F. Supp. 951, 957 (D. Colo. 1993) (same).

These decisions are true to the language of Section 113(f)(2) and promote Congress' goals to encourage the early settlement of CERCLA claims and reduce the costly litigation of these complex matters. To give effect to the language of Section 113(f)(2) and to Congress' clear intent in enacting it, this Court should grant the petition, and resolve the conflict between the First and Third Circuits on this important issue.

CONCLUSION

To resolve a direct conflict between the Second, Fifth, Eighth and Eleventh Circuits on a vital issue concerning the efficient use of judicial resources to minimize the enormous costs of complex litigation, and to resolve a conflict between the First and Third Circuits and vindicate the explicit statutory entitlement not to be tried for claims for contribution pursuant to CERCLA Section 113(f)(2), this Court should grant this petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

GEORGE M. NEWCOMBE*
DAVID B. SMALLMAN
ELIZABETH A. FUERSTMAN
SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)
425 Lexington Avenue
New York, NY 10017-3909
(212) 455-2000

*Counsel of Record *Counsel for Petitioners*